Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of	)	CS Docket No. 98-120
Digital Television Broadcast Stations:	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	
	)	

A&E TELEVISION NETWORKS OPPOSITION TO PETITIONS FOR RECONSIDERATION

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EXECUTIVE SUMMARY

The FCC should deny the petitions for further reconsideration seeking dual carriage and multicast must-carry requirements. The petitions reflect broadcasters' "regulation for thee but not me" approach to digital must-carry issues. Moreover, they are based on the fable that all must-carry rules that economically benefit broadcasters are good policy, statutorily required, and constitutionally sound.

The *Second Report and Order* should be affirmed because it properly concluded that cable systems cannot be forced to carry more than a single programming stream for each broadcaster as contemplated by the Cable Act's must-carry provisions. The broadcasters largely repeat arguments the Commission already has rejected not just once, but twice. Their few new arguments either are demonstrably wrong, such as claims that the *Second Report and Order* applied strict scrutiny, or substantially undermine their position, such as their claim that multicast carriage could be justified for content-based reasons. If the Commission adopted this rationale, it would trigger strict constitutional scrutiny and require invalidation of the rules.

Broadcasters seek assured returns on their DTV investment in the form of carriage guarantees at the expense of cable programmers. Rather than competing for carriage of their secondary video services, broadcasters threaten to withhold the full potential of digital allotments unless they are assured of distribution by government fiat. But the Act's must-carry requirements were never intended to give broadcasters any more access to the cable platform than is necessary to ensure broadcasters an opportunity to reach enough viewers to support free over-the-air television. The Commission correctly found this purpose is met by the existing requirement to carry a single "primary video" stream. The Commission also found that neither dual carriage nor multicast must-carry would advance government interests in preserving free over-

the-air TV, source diversity, or fair competition, and that requiring either would burden more cable speech than necessary. Contrary to petitioners' claims, the PBS-NCTA Agreement and other record evidence show cable operators are wiling to and do carry compelling digital broadcast programming based on marketplace considerations. Accordingly, nothing further is required here.

Broadcasters essentially admit their statutory arguments are repetitious and therefore do not merit reconsideration. In addition, the petitioners note, for example, that the Act does not apply to DTV, was written with analog not digital in mind, and had nothing to do with distinguishing between multiple video streams. Consequently, their claims that the Cable Act's plain language "unambiguously" requires dual carriage and multicast must-carry lack credibility. The Act's structure and statutory history reveal Congress did not discuss multicasting in 1992, did not make findings about multicasting in relation to must-carry, and to the extent it considered "advanced" TV at all it focused on high-definition television. These omissions are critical since the Supreme Court observed that analog must-carry was acceptable only because Congress made "unusually detailed" findings. There are no similar findings for digital television, and the Court has made clear that Congress does not "hide elephants in mouseholes." Accordingly, the broadcasters' after-the-fact rationalizations cannot support expanded must-carry rights.

The Commission applied the proper constitutional analysis and correctly held the First Amendment bars dual carriage and multicast must-carry. It applied intermediate scrutiny as required by the Supreme Court's *Turner* and *O'Brien* decisions, not strict scrutiny as the broadcasters allege. The Commission closely adhered to the test set forth in *Turner* and reached objectively reasonable conclusions, based on substantial evidence in the record. Specifically, it found that dual carriage and multicast must-carry would not advance interests Congress

articulated and the Supreme Court analyzed in *Turner* to support analog must-carry. The fact that the Commission largely refused to consider other interests put forth by the petitioners does not constitute grounds for reconsideration, but is required by the Supreme Court holding in *Turner*. It also properly held that dual carriage and multicast must-carry would impose too great a burden on cable speech, since the true burden of must-carry requirements is the plethora of unfair competitive advantages they give broadcasters at the expense of cable programmers.

Petitioners' promises that they will provide quality programming on multicast channels in exchange for guaranteed carriage only undermines their constitutional arguments. Such a bargain would only make multicast must-carry obligations content-based, and therefore presumptively invalid under the First Amendment. As some broadcasters acknowledged earlier in this proceeding, it would be "constitutional folly" to link DTV cable carriage rules to public interest obligations or other content commitments. In *Turner,* all nine Supreme Court Justices agreed that a content-based must-carry regime would not survive constitutional review.

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A&E Television Networks ("AETN") hereby submits its opposition to the petitions for further reconsideration in the captioned proceeding, [1] which it respectfully urges the Commission to dismiss or deny because the *Second R&O* properly reaffirmed that cable systems cannot be compelled to grant broadcasters carriage of more than a single programming stream as contemplated by the Cable Act's must-carry provisions. [2]

I. BACKGROUND AND INTRODUCTION

Broadcasters and other parties that seek further reconsideration have one thing right – that "the law has not changed merely because broadcasters are moving from analog to digital transmission." [3] The *Second R&O* thus correctly re-affirmed that Sections 614 and 615 are ambiguous as to the scope of broadcaster must-carry rights during and after the DTV transition. *Second R&O* ¶ 13. It also properly re-affirmed that, given the statutory analyses and other

[1] *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 20 FCC Rcd. 4516 (2005) ("*Second R&O*"), *aff'g Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd. 2598 (2001) ("*First R&O*").

[2] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, §§ 614-615, *codified at* 47 U.S.C. §§ 534-535.

[3] Petition for Reconsideration of Paxson Communications Corp. ("Paxson) at 5.

evidence in the record, as well as constitutional considerations articulated by the Supreme Court, [4] cable operators cannot be forced to carry both a broadcaster's analog and DTV signals, or more than a single "primary" program stream of stations that multicast. *Second R&O* ¶¶ 14-41. These conclusions rest primarily on findings that neither dual carriage nor multicast must-carry would advance the government interests underlying the Act's must-carry requirements – preserving free over-the-air television, promoting widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for programming. *Id.* ¶¶ 14-22, 37-39. *See Turner II*, 520 U.S. at 189; *Turner I*, 512 U.S. at 662. The Commission also found that such requirements would burden more cable speech than necessary to serve any legitimate government interest. *Id.*

Though these are the same conclusions reached in the *First R&O*, broadcasters continue to resist FCC efforts to "provide certainty" via final resolution of these carriage issues. *Second R&O* ¶ 1. They assert that the FCC misunderstood provisions in Sections 614 and 615, which petitioners believe unambiguously require dual and multicast must-carry, and that the *Second R&O* misapplied *Turner*'s constitutional framework. [5] One petitioner even claims the FCC's actions "leave the door permanently open to reconsideration." Paxson at ii. In fact, the Commission has now twice concluded the Act does not – and cannot consistent with the First Amendment – require dual carriage or multicast must-carry. [6] It is only petitioners' refusal to

[4] *Turner Broad, Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[5] Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. ("NAB") at 3-15; Petition for Reconsideration of the ABC Television Affiliates Association, CBS Television Association, NBC Television Affiliates, ABC Owned Television Associations, NBC and Telemundo Stations ("Networks") at 3-14; Paxson at 8-13.

[6] In this regard, broadcasters have had multiple opportunities to make their case, first in response to the initial Notice of Proposed Rulemaking in this proceeding, then on reconsideration

accept that determination that prevents finality. Nor is it true that "full digital multicast must-carry [has not] been definitively resolved." *Id*. at 2. The FCC long ago decided that the Act's mandate for cable operators to carry a station's "primary" video signal means only a single program stream,[7] and it has now affirmed that decision. *Second R&O* ¶¶ 33-41. Accordingly, petitioners' claims that further action is required by the Commission are entirely baseless.

Just as neither the law nor the Commission's stance has changed, the broadcasters' arguments here are largely the same as they have been throughout this seven-year-long proceeding. They offer the same statutory analyses that have not prevailed, and for the most part the same efforts to show expanded must-carry rights pass constitutional muster under *Turner*. The scant new argumentation by broadcasters is demonstrably wrong, such as claims that the *Second R&O* applied strict First Amendment scrutiny. Petitioners' other arguments substantially undermine their position, such as the premise that multicast carriage could be justified for content-based reasons, a rationale that would trigger strict First Amendment scrutiny. This level of review necessarily would require invalidation of the rules.

We specifically rebut each of these statutory and constitutional claims in Sections II-III below. At the outset, however, it is important to highlight several overarching themes that characterize the broadcasters' position. The petitioners suffer from the misimpression that the Act's must-carry provisions were intended to guarantee success for whatever DTV business model broadcasters decide to pursue. They continue to protest, for example, the "substantial costs of building and operating digital facilities" in the absence of guaranteed "opportunities to

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of the *First R&O*, then in response the Further Notice of Proposed Rulemaking appended to the *First R&O*, not to mention in numerous *ex parte* filings. Given that, as shown below, they raise little new here, the petitions should be summarily denied.

[7] *First R&O*, 16 FCC Rcd. at 2622 (construing 47 U.S.C. § 614(b)(3)(A)). *See also* Brief for Respondent FCC, *In re Paxson Communications Corp.*, No. 04-1290 (D.C. Cir. Dec. 22, 2004).

recoup that investment." NAB at 17-18. AETN has shown, however, that there is no justification for petitioners' expectation that the government should provide a guarantee of success, or that the law supports it. [8]

Rather than competing for carriage, broadcasters threaten to withhold the full potential of their digital allotments unless they are assured distribution by regulatory fiat. *E.g.*, NAB at 17. But this position provides neither a policy basis nor a statutory or constitutional justification for expanded must-carry rights. It only offers a cart-before-the-horse conclusion that insists on carriage before they commit to offer compelling content, rather than producing compelling content in an effort to build demand that in turn earns cable carriage. Petitioners admit that high-quality broadcast programming has no problem gaining access to cable systems, [9] yet claim that commercial stations are unable to negotiate multicast carriage. *E.g.*, Networks at 16-20. They never explain, however, why, if content is compelling enough to generate demand, it will have difficulty getting carried on cable systems.

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[8] The claim that "[m]ultiple independent producers commented … that they need additional means of access to the public for their programming," is just as true of cable programmers as it is of broadcasters. Networks at 10. *See also id.* at 11 ("new programming sources" have "no real option but to continue to seek carriages from MSOs"). To the extent broadcasters are required to construct and operate digital facilities, *see* NAB at 18, this is a fair trade-off for the many regulatory advantages they enjoy, including receipt of free spectrum, guaranteed cable carriage of one program stream, retransmission consent rights that can be parlayed into carriage for additional programming or other consideration, guaranteed access to the basic cable tier, and freedom from having to pay for carriage, should they ever need to compete for it (unlike cable programmers). *See also Second R&*O ¶ 17 n.65. Of course, only a broadcaster's unrealistic sense of entitlement can make such perks sound like punishment. *See* Networks at iv ("Congress and the Commission provided to broadcasters – at their substantial expense, disruption and risk and for the price of surrendering over 25% of their spectrum – an opportunity to use digital technology to enhance their services[.]").

[9] *E.g.*, Paxson at 15 (citing "cable operators' willingness to negotiate multicast carriage with … network affiliates"). Indeed, the popularity of some broadcast programming gives its owners market power to insist on carriage of less-demanded affiliated offerings at the expense of programmers who lack the leverage of must-carry status.

It is not true, as the Networks claim, that "without a carriage requirement, many cable operators will *not* carry multicast services." Networks at 17 (emphasis in original). Though broadcasters minimize its significance, the PBS-NCTA Agreement demonstrates to the contrary, as the Commission correctly found. [10] It reflects cable operator willingness to carry DTV offerings that present something new or unique, or for which there otherwise is public demand. So, too, does the carriage accorded a wealth of commercial DTV offerings, including some the broadcasters cite in claiming multicasters need FCC-mandated carriage to survive. [11]

As AETN has observed, the bottom line of the broadcasters' position throughout this proceeding has been "regulation for thee but not for me." [12] AETN has provided numerous examples in this docket, yet petitioners here continue to seek regulatory favoritism. One reason broadcasters seek reconsideration is their belief that the *Second R&O* failed to consider the benefits DTV stations will provide, given their public interest responsibilities. [13] They accordingly implore the Commission to delay or recalibrate its analysis here to coincide with the outcome of

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[10] *Second R&O* ¶ 38. Broadcasters incorrectly argue that the PBS-NCTA Agreement "show[s] that multicast carriage is not burdensome to cable." Networks at iv. What it really shows, though, is that cable operators do not oppose *market-based* multicast carriage when they are offered quality programming.

[11] *Compare, e.g.*, NAB at 22 (noting WRAL-DT, Raleigh, North Carolina, offering of high-definition programming and a full-time local news service on its digital channel), *with* www.timewarnercable.com (listing digital WRAL News as cable channel 256). *See Second R&O* ¶¶ 24, ¶ 38 & nn.145-146. *See also id.* at ¶ 40 ("cable operators want to carry HDTV and other compelling digital broadcast[ing] … desired by … customers"). As Commissioner Adelstein noted, "broadcasters can continue … to drive innovation and champion the potential of digital broadcasting" by "produc[ing] strong local programming" that the public demands and that compels carriage. *Second R&O*, Separate Statement of Commissioner Jonathan S. Adelstein ("Adelstein Statement") at 8.

[12] *See* AETN Reply, Dec. 22, 1998 at 8-16 ("AETN Reply"). *See also* Court TV Comments, April 21, 2003 at 19-23. For example, despite a stated desire to promote the digital transition, broadcasters have consistently opposed any high-definition programming requirements. AETN Reply at 10-11 n.14 (quoting NAB Comments, MM Docket No. 87-268, Nov. 20, 1995 at 1-5).

[13] NAB at 16-24; Networks at 20-24 (both citing *Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd. 21633 (1999) ("*DTV Public Interest NOI*")).

the *DTV Public Interest NOI*. *Id*. *See also* Networks at 3 (*Second R&O* not "calibrated with … broadcasters' digital public interest responsibilities."). However, this contention raises significant new constitutional problems, which we address below. *See infra* Section III.C. But for present purposes, it is notable that in trying to tie a multicast must-carry mandate to the expected merits of programming carried by multicast channels under broadcasters' public interest responsibilities, the broadcasters at the same time seek to be free of the very regulatory mandates they claim support their cause. [14] The Commission should reject the broadcasters' efforts to have it both ways, just as it should reject their repetitive statutory and constitutional arguments.

II. THE CABLE ACT DOES NOT REQUIRE EITHER DUAL CARRIAGE OR MULTICAST MUST-CARRY

Assertions that the Commission erred in finding the Act's must-carry provisions ambiguous with respect to carriage of DTV signals provide no basis for granting reconsideration. Claims that the "plain language" of Section 614 requires the FCC to rethink the *First R&O* and *Second R&O* are internally inconsistent and/or rely on revisionist history. *See* NAB at 4-9; 8-13. Before reaching the substantive flaws in the broadcasters' statutory analyses, however, some threshold matters must be addressed. First, there have been no material changes bearing on broadcasters' statutory claims that support reconsideration. [15] The legislative history compiled in

[14] *See* Networks at 23 ("Any additional [public interest] obligations for multicast services should be reasonable and flexible" and afford maximum discretion to multicasters). *See also* Paxson at 6-7. *Cf.* Adelstein Statement at 8 ("It is … unacceptable to maintain that broadcasting is a free market whenever proposals are made about accountability, but then, without blinking, … demand a government mandate for free cable carriage of multiple signals, not to mention other protections for the industry.").

[15] Nor have there been in any FCC conclusion. The Commission did not "reverse its earlier conclusion that the Cable Act required carriage of only one [DTV] programming stream." NAB at 6. Rather, it found in the *First R&O* that the Act is ambiguous, 16 FCC Rcd. at 2603-09, 2620, and subsequently affirmed that conclusion. *Second R&O* ¶¶ 13, 29. The only departure the Commission made in doing so was to slightly reevaluate the term "primary video" in Sections 614(b)(3) and 615(g)(1) to "acknowledge … that the language … may be less definitive

the years preceding the Cable Act and the relevant provision of the Act took final form with the Act's passage in **1992**. Since this proceeding commenced in 1998, and given the many opportunities broadcasters had to make arguments on this point, *see supra* note 6, they long ago could have made whatever case they thought best regarding the Act's "plain language." The present arguments are thus either (i) repetitious and of little import on (further) reconsideration, [16] or (ii) newly made without any showing why they could not have been previously raised. Either way, the procedural defect is sufficient reason to reject the broadcasters' statutory arguments, even if the substantive flaws discussed below were absent. [17] Second, the broadcasters' claims that the FCC misapplied a clear statutory mandate for dual carriage and/or multicast must-carry are manifestly inconsistent with their decision to seek further reconsideration rather than judicial review. If broadcasters believed their own arguments, they would proceed without further delay to the courts, the one forum able to definitively right the alleged error of law the broadcasters redundantly advance here.

A. Petitioners Tacitly Admit the Commission Correctly Determined the Act is Ambiguous

Broadcasters misguidedly argue that "the plain language of Section 614 *requires* carriage of analog and digital television signals," including "carriage of all non-subscription

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than" the *First R&O* suggested. *Id*. at ¶ 33. This is not a "reversal" of the conclusion the Act is ambiguous – if anything, it declares the language is even *more ambiguous* than previously held.

[16] *See, e.g.*, *Second R&O* ¶ 13 (summarily disposing of "arguments that the parties have presented" that were "essentially … no different from those that have previously been submitted, considered and rejected"). *Cf.* NAB at 5-6 (recapitulating broadcasters' statutory arguments made in "extensive pleadings" earlier in the proceeding).

[17] Since the broadcasters' arguments are either repetitious or newly conceived, the Commission would find it exceedingly difficult to explain its change of course were it to depart from the conclusions it has now twice reached. *See Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) ("When an agency waffles without explanation, taking one view one year and another the next … [c]ourts are correspondingly less willing to accept the agency's latest word as authoritative.").

programming streams," *i.e.*, dual carriage and multicast must-carry are unambiguously mandated by the Act. NAB at 4, 6 (emphasis added); Networks at 3-4 n.13; Paxson at 4, 9-12. However, their arguments prove only what the Commission found in this proceeding – that the statute really is ambiguous. For example, NAB acknowledges "[t]he Commission *properly recognized* that [Section 534(b)(3)'s 'primary video'] language does not directly translate to digital technology." NAB at 7 (emphasis added) (quoting *Second R&O* ¶ 34). *See also id*. ("There were … no secondary video services that could be transmitted in the analog world."). Paxson concurs that "the must carry provisions were written with analog, not digital signals in mind." Paxson at 9. It also notes "Section 614 has nothing to do with distinguishing between multiple video streams." *Id*. at 10 n.19.

Such concessions confirm that the Act is ambiguous with respect to what DTV signals Section 614 requires cable operators to carry. The Act could not have *unambiguously* required the outcome the broadcasters now seek where (1) Congress adopted the Act's must-carry provisions in a manner that "does not translate to digital technology," (2) it did not have digital signals "in mind," and (3) the must-carry mandate had "nothing to do with" the prospect that broadcasters might one day multicast. At minimum, for a statute to have an unambiguous meaning, it must at least be something Congress had "in mind" during the drafting. [18] Instead, as shown below, multicasting was not on Congress' mind when it adopted the Cable Act, and the prevailing thought was that high-definition service, not multicasting, would be the magic bullet for broadcasters in ushering in the digital transition. *See infra* at 9-10. Given this fact, and the

[18] *See, e.g., St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 786 (1981); *United States v. Langley*, 62 F.3d 602, 614 (4th Cir. 1995) (Phillips, J., concurring). *Cf. Atonio v. Wards Cove Packing*, 10 F.3d 1485, 1492 n.3 (9th Cir. 1993).

broadcasters' admissions above, it is not credible that Section 614 conveyed *anything* unambiguously with respect to cable carriage of DTV signals.

B. The Act and its Legislative History Confirm that Section 614 is Ambiguous Regarding Carriage of DTV Signals

The Act and its legislative history confirm that Section 614 is ambiguous such that it "neither mandates nor precludes" requiring "simultaneous carriage of both a television station's digital and analog signals" and "the term[ ] 'primary video' as used" in the Act is "susceptible to different interpretations." *Second R&O* ¶¶ 13, 33. As AETN already has shown, and the Commission now twice agreed, the plain language of Section 614 does not clearly define the scope of DTV carriage obligations. *See Second R&O* ¶ 12 & AETN pleadings cited therein. Neither the reference in Section 614(b)(4)(B) to "changes in … carriage requirements" as standards for broadcast signals evolve, nor the unadorned phrase "primary video" in Section 614(b)(3)(A), provide specific insight into Congress' intent. Indeed, the fact that broadcasters and cable providers disagree so sharply on the meaning of the provisions itself shows that the Act is "capable of being understood in two or more possible senses or ways," *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001), as the Commission recognized. *Second R&O* ¶ 10 ("It is precisely the ambiguity of the statute that has driven … policy debate over carriage of digital stations."). The finding of ambiguity is reinforced by the earlier FCC observation that "Congress … did not intend to confer must carry status on advanced television" but rather "the issue is to be the subject of [an FCC] proceeding under section 614(b)(4)(B)." *Carriage of the Transmissions of Digital Television Broadcast Stations,* 13 FCC Rcd. 15092, 15098 (1998) ("*NPRM*") (citing Conference Report, 104th Cong. 2d Sess., Report 104-230 at 161) (internal quotes omitted).

The legislative history of the 1992 Cable Act sheds no additional light on the issue of DTV carriage. As the Commission noted, Congress was not expansive in discussing the

meaning of Section 614(b)(4)(B), the only part of the Act that mentions digital television, *NPRM*, 13 FCC Rcd. at 15094 n.1, and nothing in the legislative history suggests either dual carriage or multicast must-carry is required. *See, e.g.*, *Second R*&O ¶ 36. If anything, the legislative history weighs in favor of the result in the *Second R&O*, since it reveals Congress did not discuss multicasting in 1992, nor make any findings about multicasting with relation to must-carry. *Accord*, Paxson at 14. Moreover, it is clear that to the extent Congress had specific "advanced" TV offerings in mind at the time it debated and adopted the Cable Act, its thoughts were on HDTV, not multicasting. *See Second R&O*, ¶ 4 n.10 & legislative history cited therein.

It is telling that the legislative history does not discuss broadcasters simultaneously operating analog and digital facilities, or engaging in multicasting, or the cable carriage rights of such signals. As the *Turner* Court repeatedly observed – and relied heavily upon – Congress made "unusually detailed statutory findings" in ordering analog must-carry. [19] The broadcasters concur. *See* Networks at 1 (citing "extensive factual findings and policy conclusions" behind 1992 Act's must-carry provisions). Given the detailed legislative record, it is reasonable to expect Congress would have discussed the issue more expansively if it intended to require multicast carriage. [20]

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[19] *Turner I*, 512 U.S. at 646. *See also id*. at 632 ("Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry.") (citing S. Rep. No. 102-92, pp. 3-4 (1991); H.R. Rep. No. 102-628, p. 74 (1992); U.S. Code Cong. & Admin. News 1992, pp. 1133, 1135, 1136); *id.* at 649, 662 (same); *id.* at 669 (Blackmun, J., concurring) (Congress "compiled an extensive record"); *Turner II*, 520 U.S. at 187; *id.* at 199 (Congress considered "years of testimony" and "volumes of documentary evidence and studies offered by both sides").

[20] Subsequent action by Congress and relevant legislative histories in the Telecom, Balanced Budget, and Satellite Home Viewer Improvement Acts show that Congress did not intend to compel carriage beyond the single programming stream specified for analog must-carry. For example, in the Telecom Act, Congress declined to mandate must-carry status for advanced television or other video services offered on an ancillary or supplementary basis. *See* 47 U.S.C. § 336(b)(3). Congress also avoided adopting any must-carry mandates in the

The broadcasters' discussion of the history of the DTV proceeding and Section 614(b)(4)(B) of the Act accordingly cannot establish a dual or multicast must-carry mandate. Their after-the-fact rationalizations cannot compensate for the lack of significant discussion of DTV must-carry in the legislative history. If Congress intended that the FCC greatly expand the cable industry's must-carry burden to accommodate DTV, it would have done so more explicitly and plainly. "As the Supreme Court has reminded us, Congress does not … hide elephants in mouseholes." *American Library Ass'n v. FCC*, 2005 WL 1047587 at *15 (D.C. Cir. May 6, 2005) (citation and internal quote omitted). *See also MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 230 (1994) (Congress does not adopt significant requirements by "subtle" mandates); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"). Indeed, as the Commission notes, Congress knows how to mandate a dual carriage requirement explicitly when it intends to do so. *See Second R&O* ¶ 18 n.73 (citing Satellite Home Viewer Extension Reauthorization Act, Pub. L. No. 108-447, § 210 (2004)). In sum, petitioners are wrong that the Cable Act clearly requires dual carriage or multicast must-carry and their requests for further reconsideration should be rejected.

C. The First Amendment Requires the FCC to Implement the Act in a Constitutional Manner

Even if petitioners were correct that Congress intended Section 614 to require cable operators to carry all analog and digital signals, the Commission nevertheless would have to reach the same result as in the *Second R&O*, for it must implement the statute in a manner that

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Balanced Budget Act of 1997. H.R. Conf. Rep., 105th Cong., 2d Sess. 577 (1997). *See Second R&O* ¶ 13 & AETN submissions cited therein.

does not violate the First Amendment.[21] As shown in Section III, the Commission reached the correct constitutional result in the *Second R&O*. Whatever broadcasters believe Section 614's "plain language" requires for carriage of digital signals, the FCC cannot adopt dual carriage or multicast must-carry rules unless they conform to the constitutional limits the Supreme Court set out in *Turner*.

Accordingly, there is no merit to petitioners' claims that it "was … not appropriate to re-open debates about the … constitutionality" of dual and multicast must-carry, Networks at 2, or that "there was no need for the Commission to even consider [their] constitutionality."[22] The *Second R&O*'s rejection of expanded carriage rights was not a "re-opening" of any issue. Rather, it was a necessary review of whether the First Amendment framework that *Turner* established for all must-carry rules under Section 614 constitutionally allows new dual carriage or multicast must-carry obligations. To the extent the FCC *ever* contemplates must-carry rules under Section 614 different from those in *Turner*, such constitutional analysis is *mandatory*.[23]

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[21] This is true not only as a constitutional imperative, as shown in this section, but also as a matter of statutory construction. *See e.g., Building Owners & Mgrs. Ass'n Int'l v. FCC*, 254 F.3d 89, 101 (D.C. Cir. 2001) (Randolph, J., concurring) (citing "the familiar canon that if one permissible interpretation of statute would render it unconstitutional and another … would make it constitutional, the latter should prevail").

[22] NAB at ii. While these objections are misplaced, they do undercut Paxson's claims that the Commission "does not address cable operators' First Amendment objections to multicast must-carry" in the *Second R&O*, and that it "appears to have retreated from its previous view that" constitutional considerations "provide[ ] strong support for the anti-multicast position." Paxson at 13 n.28. If anything, the *Second R&O*'s entire multicast must-carry analysis, after finding the statute ambiguous on this point, turns on whether additional carriage rights would satisfy *Turner*. *See Second R&O* ¶¶ 37-41.

[23] *See Time Warner En'm't Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (in conducting constitutional analyses "the FCC must show a record that validates the regulations, not just the abstract statutory authority") (citing *Turner I*, 512 U.S. at 664). Notably, *Time Warner* vacated as unconstitutional rules implementing horizontal and vertical ownership limits in the Act, even though the court had previously denied a facial constitutional challenge to the

III. THE DETERMINATION NOT TO ORDER EXPANDED MUST-CARRY RIGHTS PROPERLY APPLIED ESTABLISHED CONSTITUTIONAL PRECEPTS

The Commission applied the proper analysis and correctly held that the First Amendment bars dual carriage and multicast must-carry. Paxson incorrectly asserts that "the First Amendment issues implicated" in this proceeding "are so insubstantial they do not merit serious discussion." Paxson at 13 n.28. Quite to the contrary, the Commission properly analyzed the constitutional issues and should reaffirm its decision.

A. The Commission Did Not Apply Strict Scrutiny

There are no grounds for reconsidering the *Second R&O* based on arguments that the Commission improperly applied strict scrutiny or any other "wrong standard." NAB at 9-11; Networks at 4-6. It is clear that the Commission hewed closely to the appropriate standard – *Turner*'s intermediate scrutiny test – by analyzing each interest identified therein and assessing whether dual carriage or multicast must-carry would advance them. *Second R&O* ¶¶ 19-22, 37-39. To the extent it departed from the *Turner* framework, it did so in the broadcasters' favor by considering an additional interest not stated in the Cable Act or authorized in *Turner* – advancement of the DTV transition. *See id*. at ¶¶ 23-25, 40. Despite this improper step, the Commission still could not find in favor of expanded carriage rights.

The pretextual basis for petitioners' claim that the Commission applied strict scrutiny is that it sometimes used words like "necessary" or "need" in its constitutional analysis. [24] But the colloquial use of these words as cited by the broadcasters does not mean the

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statutory provisions. *See id*. at 1130 (discussing *Time Warner Entm't Co. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000)). *Accord Second R&O* ¶ 15.

[24] *See, e.g.*, NAB at 9 (citing *Second R&O* ¶¶ 15, 22, 24, 25, 37, 38, 41); Networks at 5 (citing *Second R&O* ¶¶ 38, 41). Ironically, after complaining that the Commission improperly applied strict scrutiny when it in fact applied intermediate scrutiny, the broadcasters go on to

FCC changed the constitutional standard. Such language is not a departure from the level of scrutiny set forth in *Turner*, and the Act itself requires the FCC to adopt "changes in … carriage requirements" that are "*necessary* to ensure … carriage of … stations which have been changed" to DTV operation. 47 U.S.C. § 534(b)(4)(B) (emphasis added). The cited language is merely a restatement of the relevant case law that rules "must not substantially burden more speech than is *necessary* to further the government's legitimate interests." *Second R&O* ¶ 15 (paraphrasing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)) (emphasis added). Even the *Turner* Court, in establishing a constitutional must-carry framework, routinely used such language, [25] and there can be no doubt it applied anything other than intermediate scrutiny. *Turner I*, 512 U.S. at 643-61 (explaining in detail strict scrutiny did not apply to content-neutral regulations).

The broadcasters' argument is mere semantics. The Commission explicitly identified intermediate scrutiny as the applicable standard and correctly applied *Turner*'s factors. *Second R&O* ¶ 15. First, it required a showing only that the asserted government interests are "substantial," *e.g.*, *Turner I*, 512 U.S. at 663-64, and did not require a compelling interest, as would be required under strict scrutiny. [26] Second, the Commission did not consider whether dual carriage or multicast must-carry would be the least restrictive means of advancing interests to which they are directed. *See, e.g., United States v. American Library Ass'n*, 539 U.S. 194, 207

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urge, in advocating for multicast carriage rights, that the Commission examine the possible content of multicast offerings, a step that, if taken, *would* require application of strict scrutiny. *See infra* Section III.C.

[25] *E.g.*, *Turner I*, 512 U.S. at 665 (discussing "factual *necessity* for must-carry"); *id*. at 666 (weighing "Government's assertion that the must-carry rules are *necessary*"); *Turner II*, 520 U.S. at 211 (holding that "[t]he question is not whether Congress … was correct to determine must-carry is *necessary* to prevent a substantial number of broadcast stations from losing cable carriage," but "[r]ather … whether [that] conclusion was reasonable and supported by substantial evidence") (all emphases added).

[26] *See, e.g., United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000).

(2003). With respect to tailoring, the Commission examined only whether expanded carriage rights would burden more cable speech than necessary. [27]

B. The Commission Properly Applied *Turner*

Contrary to the broadcasters' claims, the Commission did not, when applying *Turner*'s constitutional framework, "fail to consider an important aspect" of DTV carriage or "how the record … in this proceeding related to th[e] interests" identified in *Turner*, NAB at 17, or otherwise materially err in its First Amendment analysis. *See id*. at 11-20. Rather, it properly examined whether the record showed carriage of more than a single program stream would help preserve free over-the-air television, promote widespread dissemination of information from a multiplicity of sources, or aid fair competition in the market for programming, *Turner II*, 520 U.S. at 189; *Turner I*, 512 U.S. at 662, and concluded that expanded must-carry would not advance these interests or justify burdening cable speech. *Second R&O* ¶¶ 16-22, 37-39. Stripped to their core, the petitioners' chief complaints are that the Commission did not consider an expansive list of other possible governmental interests that would allow a different result, and that its burden analysis was not sufficiently tied to cable capacity, which broadcasts wrongly tout as the only measure of must-carry's burden. Had the Commission conducted its constitutional

[27] *Second R&O* ¶ 25. In actuality, Petitioners' complaint with regard to the constitutional standard seems to be that the *Second R&O* applied intermediate scrutiny too stringently. *See* NAB at 10. However, contrary to petitioners' assumptions, intermediate scrutiny is no easy hurdle to clear. The test is essentially identical to the commercial speech test. S*ee, e.g.*, *Capobianco v. Summers*, 377 F.3d 559 565 (6th Cir. 2004) ("commercial speech is subject to intermediate scrutiny in a First Amendment challenge"). In either case, the government must "prove [a] regulation directly advances [its] interest and is not more extensive than necessary to" do so. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374 (2002) (internal quote and citation omitted). The government must "carefully calculat[e] the costs and benefits [of] the burden on speech," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001), and if it can "achieve its interests in a manner that … restricts less speech, [it] must do so." *W. States Med. Ctr.*, 535 U.S. at 371. *See also N. Olmsted Chamber of Commerce v. City of N. Olmstead*, 86 F.Supp.2d 755, 770 (N.D. Ohio 2000) ("the Supreme Court's recent cases have given extra bite to … intermediate scrutiny").

analysis as the broadcasters advocate, however, the outcome would have been the same, and reconsideration still unwarranted.

1. The Commission Faithfully Followed *Turner*'s Interest Analysis

In evaluating the elastic approach to *Turner* that the broadcasters advocate, it is important to keep in mind that must-carry is inherently unfair because "[b]roadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored." *Turner I*, 512 U.S. at 645. As Justice O'Connor put it, this "controversial judgment [is] the heart" of must-carry. *Id.* at 679 (O'Connor, J., concurring in part and dissenting in part). Each guarantee of carriage for a broadcast video stream means that one other programmer loses an opportunity to gain carriage. This is the case regardless of how large cable capacity grows or how small we learn to compress program streams. While it is true every unit of "shelf space" a broadcast program stream occupies could be equally occupied by a non-broadcast programmer, it is equally true that must-carry's regulatory preference for broadcasters has an impact far beyond the one-to-one swap of program streams it may necessitate. *See infra* at 20-21.

For these reasons, the validity of any must-carry requirement – including expanded carriage for DTV as requested by petitioners – must be analyzed solely in terms of the Act's purposes. The *Turner* Court refused to consider rationales "inconsistent with Congress' stated interests in enacting must carry," *Turner II*, 520 U.S. at 190-191, and other courts have found it impermissible to "supplant the precise interests put forward by the State." *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)). The Commission therefore cannot credit the claim that

reconsideration is warranted because "the Commission failed to take into account other government interests in addition to those enumerated in *Turner*." [28]

Must-carry was never intended to be a guarantee of financial success for broadcasters. Nor was it designed to create new business opportunities. Rather, it was crafted to give broadcasters an opportunity to reach enough viewers so that free over-the-air television would remain viable. *Turner I*, 512 U.S. at 646 ("Congress' overriding objective" was "to preserve access to free television programming for … Americans without cable."). Accordingly, the Court in *Turner* examined with great particularity the extent to which the rules advanced the central must-carry interests it held that Congress had identified. *See Turner II*, 520 at 189. The Commission thus correctly recognized that "the focus of the government interest in *Turner* is not the economic health of broadcasting per se," *Second R&O* ¶ 18, and broadcasters simply have it wrong in urging reconsideration on grounds that "multicasting will enhance the health of local broadcast services." [29]

The analysis of this issue necessarily differs when weighing whether to accord carriage rights to the first broadcast program stream as compared to carriage for additional streams. In the former case, a grant of initial access to cable systems arguably speaks to interests

[28] Networks at ii. It accordingly would be unconstitutional for the FCC to expand carriage rights based on interests such as "clear[ing] spectrum for … public safety services," NAB at 17 n.38, "lessen[ing] viewer disenfranchisement," "expedit[ing] the availability of [broadcasters' surrendered analog] spectrum," "rais[ing] billions by auctioning … spectrum," or bolstering "localism." Networks at 12-13.

[29] Networks at 7. In echoing this theme, NAB at 19 ("lack of carriage of … multicasting streams would imperil the financial health of local broadcasters"), NAB not only misunderstands that *Turner* did not approve any must-carry requirement that would benefit a broadcaster's bottom line, but also that it approved analog must-carry to help preserve *existing* broadcast services rather than opportunities for future new services that have yet to generate revenue for broadcasters and that they thus cannot possibly cite as vital to their *continued* existence. *See Turner II* at 193.

identified in *Turner*, but in the latter it cannot.[30] The Commission, which consistently has understood this, focused specifically on whether carriage of *additional* program streams via duplicative dual carriage or multicast must-carry advances any *Turner* interests. This is why, in the final analysis, nothing in the record demonstrates that an absence of *additional* carriage rights endangers the Act's core objective of assuring access to free television for Americans without cable. It is also why the broadcasters err in asserting that "not focusing on the quality and quantity of over-the-air service, but only on whether digital carriage was 'essential' to station survival … fundamentally misunderst[ands] the issue." NAB at 19. Expanded carriage cannot be justified based on the bare fact that "multicasting will bolster the economic vitality" of broadcasters. Networks at 9.

The Commission correctly affirmed that carriage of a single "primary video signal" already required is sufficient to prevent broadcasters from losing so much audience share as to render infeasible continued service to non-cable viewers, *Turner I*, 512 U.S. at 634, and that dual carriage and multicast must-carry do not advance interests in preserving free over-the-air television or ensuring fair competition. *See Second R&O* ¶¶ 18, 20, 38. The Commission did not "consider this latter interest in great detail", *id*. ¶ 20, but if it had, it surely would have had to recognize it is the antithesis of "promoting competition" to grant expanded carriage guarantees to favored programmers. It does not promote "fair competition" to insulate multicast offerings from the same competitive pressures that all other programmers face. In this regard, the Commission also correctly concluded that it does nothing to enhance diversity to give broadcasters

[30] *Id*. at 195-213. Though it should be noted that changes in the market, in technology, in viewing patterns, and in media other than cable and broadcast TV, and other similar considerations, might well now necessitate a different outcome on analog must-carry.

multiple cable channels via dual or multicast must-carry.[31] Quite to the contrary, the FCC properly found that this latter effect "would arguably diminish [diversity by impeding] the ability of other, independent voices to be carried on the cable system." *Second R&O* ¶ 39.

If the Commission did err, it was in considering advancement of the digital transition a government interest that might support expanded carriage and assessing whether dual carriage or multicast must-carry could advance that interest. *Second R&O* ¶¶ 23-25, 40-41. Promoting a new type of broadcast program service was not among the goals Congress set forth for analog must-carry and the Supreme Court relied upon in narrowly affirming its constitutionality. AETN has demonstrated the substantial disconnect between the imperative to speed the DTV transition and the statutory goals underlying must-carry mandates,[32] and that the goal of facilitating the DTV conversion may not be substituted for those Congress specifically identified. *See supra* at 16 (citing *Turner II*, 520 U.S. at 190-191; *Edenfield v. Fane*, 507 U.S. at 768). But since the *Second R&O* rejected expanded carriage, this error is harmless.[33]

2. The Commission Properly Examined the Burden of Dual Carriage and Multicast Must-Carry

The Commission must reject broadcasters' complaints about the burden analysis in the *Second R&O*, as their criticisms boil down to misplaced claims that the analysis is too

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[31] *Id.* ¶ 19 ("dual carriage … would not result in additional sources of programming [from] digital programming largely simulcasts analog programming"). This conclusion renders irrelevant NAB's observations that broadcast stations "are the only channels on a cable system that are not under the control of a single cable operator" and "continue to be an important source of local news and public affairs," NAB at 19-20, because even taking at face value whatever diversity interests those facts serve, they are sufficiently served by the single program stream for which carriage is guaranteed, and are not further served by duplicative signals from the same speaker.

[32] *See, e.g.*, Comments of A&E Television Networks, CS Docket No. 98-120, June 11, 2001; Reply of A&E Television Networks, CS Docket No. 98-120, Aug. 16, 2001.

[33] The fact that the Commission pursued this line of analysis, though it was error to do so (albeit harmless thus far), means NAB is wrong in its claim that "the Commission failed to consider how digital carriage would advance the digital transition." NAB at 17.

brief and does not focus on the comparative sizes of cable system capacity and DTV signals. [34] There was no need for the Commission to address this issue in great detail after it found neither dual carriage nor multicast must-carry could advance the Act's statutory interests. *Second R&O* ¶¶ 15-22, 37-39. Given these threshold findings, *any* additional burden on cable speech would render expanded must-carry obligations unconstitutional based on a lack of fit between the rule's benefits and burdens. [35] For this reason, even if it were accurate to say "the Commission did not … attempt to … examine the voluminous record … on cable capacity," NAB at 12; Networks at iii, such concerns are all but irrelevant.

Extended analysis of the burden would be necessary only if the Commission improperly focused on cable system capacity issues, which do not capture the true burden must-carry imposes. The *Turner* Court explained that the burden of must-carry is that, among other things, it makes "it more difficult for cable programmers to compete for carriage." [36] This means that, in a world where cable capacity is finite and there are more programmers seeking access than there is capacity to accommodate them (which clearly remains the case [37]) cable

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[34] *See, e.g.*, NAB at 12 (*Second R&O* had "no assessment of … actual burden"). *See also id.* at 10-15; Networks at 15-16 (both offering quantitative analyses of amount of capacity dual and multicast must-carry signals would occupy).

[35] *See, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999) (where burden on speech is not balanced by furthering statutory objectives, even a small restriction violates the First Amendment); *Lorillard*, 533 U.S. at 567 ("no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification").

[36] *Turner II*, 520 U.S. at 214 (quoting *Turner I*, 512 at 637) (internal quotes and edits omitted). In this regard, NAB is correct that "the core premise of *Turner* [was] that must-carry obligations could materially burden speech," NAB at 3, but errs, by focusing solely on cable system capacity, in suggesting this problem could ever disappear. *E.g., id*. at 11.

[37] AETN FNPRM Reply at 20. Given the wealth of evidence in the record of cable programmers struggling to join cable system line-ups, *e.g., Second R&O* ¶ 41 n.155, it is fallacious to suggest "there is no evidence that digital carriage … would burden cable's First Amendment rights." NAB at 11.

programmers can find themselves supplanted on cable systems by broadcast programming with must-carry rights (or leveraged onto the system via retransmission consent).

More importantly, the regulatory preference of must-carry means that broadcasters gain other advantages unrelated to "shelf space" that place cable programmers at a disadvantage. First, guaranteeing broadcasters carriage means they can avoid investments that other programmers must make. This goes beyond just being freed from the imperative to produce compelling programming (including the research, development, and other costs that the entails) while other programmers have to "earn" they way onto cable systems. It also removes the prospect of having to furnish market-based consideration in negotiating for carriage. Such consideration can include direct payment to the cable operator, marketing support for joint cable operator-programmer promotion, furnishing commercial availabilities for the cable operator's use in the cable network's programs (and the programmer's attendant loss of ability to generate revenue by selling that time), and other forms of consideration. Broadcasters assured carriage through must-carry may also spend less marketing their offering(s) since they cannot be dropped.

Cable programmers also are burdened by the fact that broadcasters can demand carriage of programming that can enter head-to-head competition with a cable programmer's offering. If a cable programmer's offering and the broadcast programming occupy the same market niche, and the cable operator determines that the services are duplicative, the broadcaster with must-carry rights cannot be dropped and the cable network may be expendable. For these reasons, digital must-carry's burden is not minimized by a comparison of the "relative" impact of analog must-carry, as broadcasters apparently believe. *See* Networks at 15; NAB at 11, 14.

It is not surprising that broadcasters continue to try to refocus the burden analysis for dual carriage and multicast must-carry on capacity issues rather than usurpation of cable

operator control and cable programmer opportunities. Doing so allows them to make the sweeping claim that the FCC did not "ever examin[e] an issue [previously] deemed crucial – the actual 'burden' that the proposed carriage requirements would have on cable." NAB at 16. What this really means is that the Commission did not examine the burden the way *broadcasters* wanted it to, though it is clear the Commission engaged in a proper constitutional analysis. By recasting the question, petitioners assert that "[c]arriage of all local digital signals would not … have any material impact on cable speech" and so should "not even be subject to a First Amendment question." NAB at i. But the Supreme Court rejected such thinking in *Turner*, and the Commission has now twice done so. [38] There is no basis for a taking any different course here.

C. Broadcasters are Inviting Strict Scrutiny in Attempting to Justify Multicast Must-Carry

By asking the FCC to adopt multicast must-carry based on the merit of various types of programming and/or recalibration of multicast must-carry analysis to reflect consideration of DTV public interest obligations, broadcasters advocate content-based rules that could not cannot be squared with *Turner*. The reconsideration petitions are rife with promises about the types of multicast programming that is offered – or that may be offered if the outcome of the *DTV Public Interest NOI* requires it. Such programming, broadcasters suggest, reflects "substantial benefits that [multicast] carriage would bring," NAB at 21, and assert it provides a basis for reconsideration. However, were the FCC to justify multicast must-carry based on the value of this programming, its effort would be presumptively invalid. *Turner I*, 512 U.S. at 644-646.

Broadcasters cite the prospects of multicast channels variously offering local news, local and/or national weather and travel information, local alerts, and local traffic, sports

[38] *Compare, e.g., Second R&O* ¶ 10 n.35 *with id.* ¶ 27 (finding that cable system capacity may well accommodate dual carriage, but rejecting it nonetheless).

and public affairs; Spanish "feeds" and other Spanish programming; programs for non-English speaking and other minorities; instructional and other programming for children; and programming on minority health issues.[39] Paxson and MMTC take the argument a step further by adding the prospect of religious and "multicultural" programming into the mix, as well as a claim that multicasting may "better serve audiences" if the FCC imposes "clear public interest obligations and programming decency standards" on it.[40] There is no doubt the kinds of programming that the broadcasters cite can be valuable, just as it is when cable programmers offer it.[41] But the more broadcasters strive to justify multicast must-carry on grounds that the programming's content is intrinsically valuable, the more likely it is a court will find that multicast must-carry is a content-based regulation of speech. As NAB previously advised the Commission, it would be:

> constitutional folly [to tie] DTV cable carriage rules to DTV public interest obligations or apply[ ] them to particular types of programming, which could render the rules "content-based" and thus likely to fail judicial review under the "strict scrutiny" standard.

Ex Parte Letter from Valerie Schulte to Marlene H. Dortch, CS Docket 98-120, Nov. 13, 2003.

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[39] Networks at 10, 14, 20-22; NAB at 3, 21-24. *See also* Petition for Reconsideration of DIC Entertainment Corporation, *passim* (advocating multicast must-carry to facilitate "free advertiser-supported, over-the-air digital children's television service" and the provision of children's programming generally).

[40] Paxson at 3-4, 6-7; Minority Media and Telecommunications Council/Hispanic Technology and Telecommunications Partnership Joint Petition for Partial Further Reconsideration ("MMTC"), *passim*. *See also* Networks at 14 ("multicast services will target niche and underserved audiences").

[41] *See Turner I*, 512 U.S. at 681 (many cable programming networks have "as much claim as PBS to being educational or related to public affairs") (O'Connor, J., concurring in part and dissenting in part).

Broadcasters now seem willing to take this risk, however, in hopes of swaying votes to the side of ordering multicast must-carry. [42] In this regard, while some Commissioners have made statements about what does and does not qualify as "public interest" programming, [43] the Supreme Court has made clear that must-carry requirements cannot be based on such considerations. It held that "[i]n a regime where … the FCC exercised more intrusive control over the content of broadcast programming" entitled to must-carry status, claims that the rules are content-based and thus unconstitutional would have "greater weight." *Turner I*, 512 U.S. at 652. This is because "speaker-partial laws … demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say." *Id*. at 658. If licensee promises or FCC expectations tied to the types of programming cited in the broadcaster petitions lead to multicast must-carry mandates, there will be no doubt "the government has adopted a regulation of speech because of agreement … with the message it conveys." *Id*. at 642. The *Turner* Court was clear that must-carry could not be "a subtle means of exercising a content preference," *id*. at 645, and any *quid pro quo* bargain reached in this proceeding would be far from subtle. [44]

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[42] *See*, *e.g.*, Networks at 20 (noting that "two Commissioners expressed concern that commercial broadcasters may fail to provide public interest programming in their multicast networks") (citing Adelstein Statement; *Second R&O*, Separate Statement of Commissioner Michael J. Copps ("Copps Statement")).

[43] *See*, *e.g.*, Networks at 20 (noting one Commissioner's aversion to infomercials") (citing Adelstein Statement at 6). *See also* Copps Statement at 1 (noting value of "public affairs programming, religious programming, family-friendly programming, Spanish-language programming, or other programming [that] reach underserved parts of … communities"); *id*. (lauding programming "covering community developments, local news, district-level Congressional races, [and] high school and local college sports"); Adelstein Statement, *passim*.

[44] *See* Adelstein Statement at 1 ("Having no assurance that true local service will materialize on each new digital program stream, I am not prepared to conclude as a legal or policy matter that Congress intended carriage of these streams."). If the Commission grants reconsideration based on the nature of multicast programming at this juncture, it is unlikely the rules will receive the benefit of any doubt whether they are content-based, as did the analog must-carry rules.

The Supreme Court undoubtedly would invalidate any digital must-carry requirement predicated on the presumed value of the favored programming. The Court only narrowly upheld single-channel analog must-carry based on the assumption by a bare majority of Justices that the rule is content-neutral. *Turner II*, 520 U.S. at 189. Four Justices concluded that analog must-carry was content-based and therefore unconstitutional, *id*. at 229 (O'Connor, J., dissenting), a conclusion that would have been unanimous if the original rules had been predicated on the arguments now put forward by the broadcasters. In evaluating analog must-carry, the majority disavowed notions that "Congress regarded broadcast programming as *more* valuable than cable programming," or that "that Congress' purpose in enacting must-carry was to force programming of a 'local' or 'educational' content on cable subscribers." *Turner I*, 512 U.S. at 648 (emphasis in original). Any must-carry mandate based even in part on the asserted "value" of the types of multicasting broadcasters highlight would not survive constitutional review.

CONCLUSION

For the foregoing reasons, AETN respectfully submits the Commission should dismiss or deny the petitions for further reconsideration and affirm the *Second R&O*'s determinations that neither dual carriage nor multicast must-carry is required by Section 614 or consistent with the First Amendment framework in the *Turner* decisions.

Respectfully submitted,

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May 26, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2005, copies of the foregoing A&E Television Networks Opposition to Petitions for Reconsideration were served by First-Class U.S. Mail, postage prepaid, to counsel of record, at the following addresses:

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